UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARDIONET, LLC, and BRAEMAR MANUFACTURING, LLC	*	
Plaintiffs,	*	
v.	*	Civil Action No. 1:15-cv-11803-IT
INFOBIONIC, INC.,	*	
Defendant.	*	

ORDER

November 20, 2015

TALWANI, D.J.

Before the court is Defendant's Motion to Dismiss, or in the Alternative, Motion to Stay Pending *Inter Partes* Review of the Patents-In-Suit [#17]. Defendant seeks dismissal for lack of subject matter jurisdiction or a stay pending review of each of the patents-in-suit by the United States Patent and Trademark Office Patent Trial and Appeal Board. For the reasons set forth below, the motion is DENIED.

I. Motion to Dismiss

This is an action for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code. The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1338(a), which respectively confer jurisdiction to the district court for civil actions arising under the laws of the United States in general and under the patent laws of the United States in particular.

Defendant's Rule 12(b)(1) motion contends that Plaintiffs lack standing because no case or controversy existed at the time Plaintiffs filed the complaint as Plaintiffs suffered no "injury in

fact." The "injury in fact" element of standing requires "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations and quotation marks omitted). Defendant contends that the complaint fails to establish an "injury in fact" because it accuses only one of Defendant's products of infringement (the "MoMe® Kardia System") and that product is incapable of infringement because it is still under development and not yet approved by the Food and Drug Administration ("FDA").

A defendant may challenge a plaintiff's allegations of subject matter jurisdiction under Rule 12(b)(1) in two ways. First, a defendant may challenge the sufficiency of the jurisdictionally-significant facts alleged in a complaint. Valentin v. Hospital Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001). In considering such "sufficiency challenges," "the court must credit the plaintiff's well-pleaded factual allegations . . . , draw all reasonable inferences from them in [its] favor, and dispose of the challenge accordingly." Id. Second, a defendant may "controvert[] the accuracy (rather than the sufficiency) of the jurisdictional facts asserted by the plaintiff and proffer[] material of evidentiary quality in support of that position." Id. In such "factual challenges," the court affords no presumptive weight to the plaintiff's jurisdictional allegations. Id.

To the extent that Defendant challenges the sufficiency of the jurisdictional allegations in the complaint, the court accepts those allegations as true, id., and determines that they are sufficient, at this stage, to establish that Plaintiffs have suffered "injury in fact" and have standing. According to the complaint, Defendant has infringed Plaintiffs' patents by committing acts of infringement with "products . . . including *but not limited to* the MoMe® Kardia System." Compl. ¶¶ 25, 38, 52, 65 (emphasis added). Defendant acknowledges that before it began

developing the MoMe® Kardia System, it developed a "first generation" device—the "MoMe® System"—which did obtain FDA approval. Defendant further concedes that "the names 'MoMe® System' and 'MoMe® Kardia System' were used interchangeably, and there is no correspondence between the name and the design generation." Defs.' Reply Supp. Mot. Dismiss 3 n.7 [#32]. Plaintiffs' complaint similarly alleges that that Defendant "recently added 'Kardia' to the MoMe® name," Compl. ¶ 17 n.1, and indeed, several exhibits attached to the complaint refer to the accused product as "MoMe®" or the "MoMe® System." See Exs. F-K to Compl. The court therefore understands the complaint's allegations regarding "products . . . including but not limited to the MoMe® Kardia System" to be allegations about the "MoMe® System" as well. Thus construed, the jurisdictional allegations are not limited to Defendant's "second generation device" as Defendant contends, and do assert that Defendant's products have infringed Plaintiffs' patents and caused Plaintiffs harm. Specifically, the complaint alleges that Defendant's products satisfy the claims of each patent, Compl. ¶¶ 26-33; 39-47; 53-60; 66-73, and that Defendant "has committed and continues to commit acts of infringement" with those products that have harmed Plaintiffs, id. ¶¶ 36-37; 50-51; 63-64; 76-77. The allegations are therefore sufficient, at this stage, to establish that Plaintiffs have standing.

To the extent Defendant challenges the accuracy of Plaintiffs' jurisdictional allegations, the court finds that the materials offered to controvert them either do not address the allegations regarding the "first generation device" or are not of evidentiary quality. The materials offered by Defendant include: 1) a copy of an attorney letter sent to Plaintiffs on August 7, 2015 stating that the "MoMe® Kardia System" has not obtained FDA approval (Caffrey Decl. Supp. Def.'s Mot. Dismiss Ex. 2); 2) a photograph from Defendant's booth at a May 2015 exhibition showing that Defendant identified the MoMe device as "not commercially available in the US at this time"

(Caffrey Decl. Supp. Def.'s Reply Ex. 1); and 3) an article published by the Boston Business Journal on August 25, 2015 and updated August 26, 2015 stating that Defendant decided to "delay launch" of its first generation device until the second generation device was ready to market (Caffrey Decl. Supp. Def.'s Reply Ex. 7). First, the attorney letter and photograph do not address the allegations that Defendant's first generation device infringed Plaintiffs' patents at all, and thus do not establish that those allegations are untrue. Second, though the Boston Business Journal article does address the allegations about Defendant's first generation device, that article is hearsay and therefore is not material of "evidentiary quality." Valentin, 254 F.3d at 363. Thus, none of the materials offered by Defendant support their position that Plaintiffs' jurisdictional allegations are inaccurate.

Therefore, whether construed as a "sufficiency challenge" or a "factual challenge," Defendant's Rule 12(b)(1) motion fails to demonstrate that Plaintiffs lack standing. Accordingly, the motion to dismiss is DENIED.

II. Motion to Stay

As an alternative to dismissal, Defendant seeks a stay of this action pending inter-partes review by the Patent Trial and Appeal Board. Defendant states that staying this action pending such review will ultimately allow the court to more efficiently resolve this dispute. However, Defendant's petitions seeking inter-partes review were only submitted in August 2015. The Patent Trial and Appeal Board has not yet decided whether to institute inter-partes review and may not do so for several months. Accordingly the court DENIES Defendant's motion to stay, without prejudice.

Date: November 20, 2015

/s/ Indira Talwani
United States District Judge